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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 HELEN L. HORVATH, dba HW ASSOC.,

12 Plaintiff,

13 vs.

14 ANTHONY TONEY, dba UPTOP GROUP
15 LLC; CAVA CUP SOCCER
16 TOURNAMENT; AMERICAS
BASKETBAL INTERNATIONAL; and dba
ABI SLAM FOUNDATION,

17 Defendants.
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CASE NO: 11-CV-1880-IEG (BLM)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,**

**(2) DISMISSING COMPLAINT
WITHOUT PREJUDICE FOR
FAILING TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED PURSUANT TO 28
U.S.C. § 1915(e)(2)(B)(ii), and**

**(3) DENYING MOTION TO
APPOINT COUNSEL**

[Doc. Nos. 2 & 3]

22 Plaintiff Helen L. Horvath, proceeding *pro se*, has filed a complaint asserting claims stemming
23 from an alleged breach of contract. [Doc. No. 1.] Horvath has not paid the \$350 civil filing fee
24 required to commence this action, but has filed a motion to proceed *in forma pauperis* and a motion to
25 appoint counsel. [Doc. Nos. 2 & 3.] For the reasons stated below, the Court (1) **GRANTS** Plaintiff's
26 motion to proceed IFP, (2) **DISMISSES** Plaintiff's Action **WITHOUT PREJUDICE** pursuant to
27 28 U.S.C. § 1915(e)(2)(B)(ii), and (3) **DENIES** Plaintiff's request for appointment of counsel.
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I. Motion to Proceed *In Forma Pauperis*

Parties instituting any civil action in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed *in forma pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). This Court finds that Plaintiff's affidavit of assets is sufficient to show that she is unable to pay the fees or post securities required to maintain this action. *See* CivLR 3.2(d). Plaintiff is currently employed, but lists no significant assets and receives government assistance. Furthermore, her loan debt and other monthly bills exceed her income. Thus, the Court **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a).

II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2)(B)(ii)

Any complaint filed pursuant to the IFP provisions of 28 U.S.C. § 1915(a) is subject to a mandatory and *sua sponte* review by the Court. The Court must dismiss any complaint it finds is "frivolous, malicious, failing to state a claim upon which relief may be granted, or seeking monetary relief from a defendant immune from such relief." 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) ("[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."). Prior to its amendment by the Prison Litigation Reform Act, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Id.* at 1130. The newly enacted 28 U.S.C. § 1915(e)(2), however, mandates that the court reviewing a complaint filed pursuant to the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing that the complaint be served by the U.S. Marshal pursuant to Federal Rule of Civil Procedure 4(c)(2). *Lopez*, 203 F.3d 1127 ("[S]ection 1915(e) not only permits, but requires a district court to dismiss an *in forma pauperis* complaint that fails to state a claim."); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) ("The language of § 1915(e)(2)(B)(ii) parallels the language of Federal Rule of Civil Procedure 12(b)(6).").

Additionally, Federal courts are courts of limited jurisdiction and cannot hear every dispute presented by litigants. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Federal courts may only adjudicate cases which the Constitution or

1 Congress authorize them to adjudicate: (1) those cases involving diversity of citizenship (where all
2 plaintiffs are from different states from all defendants and the amount in controversy is at least
3 \$75,000), *see* 28 U.S.C. § 1332; (2) those cases raising a federal question, *see* 28 U.S.C. § 1331; or
4 (3) those cases to which the United States is a party, *see, e.g.*, 28 U.S.C. § 1346. Federal courts are
5 presumptively without jurisdiction over civil cases and the burden of establishing the contrary rests
6 upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
7 (1994).

8 Here, it is unclear what causes of action Plaintiff intends to present to the Court and what facts
9 support those causes of action. Plaintiff appears to assert three claims in her complaint: (1) failure to
10 pay, (2) breach of contract, and (3) “potential wire fraud (RICO),” but the Civil Cover Sheet she filed
11 also lists claims under Title VII of the Civil Rights Act of 1964, the Interstate Commerce Act, and the
12 Federal Labor Standards Act. Plaintiff essentially alleges that she entered into a contract to provide
13 consulting services to Defendants, and that Defendants failed to compensate her as the agreement
14 required. Those allegations are insufficient to support any of federal claims listed in her complaint or
15 on the accompanying civil cover sheet. Accordingly, the Court **DISMISSES** Plaintiff’s federal claims
16 with **LEAVE TO AMEND**.

17 Furthermore, while Plaintiff’s allegations may be sufficient to support her state law claim for
18 breach of contract, nothing in the complaint suggests the Court has jurisdiction to adjudicate that
19 claim. In her complaint, Plaintiff asserts federal question jurisdiction. Because, however, Plaintiff has
20 failed to state a federal claim, the Court does not have federal question jurisdiction over this action.
21 *See* 28 U.S.C. § 1331. Plaintiff’s complaint alleges damages exceeding \$75,000, but she makes no
22 allegations regarding the citizenship of the parties. Plaintiff has not demonstrated the parties are
23 completely diverse; thus, the Court does not have jurisdiction over Plaintiff’s breach of contract claim.
24 *See* 28 U.S.C. § 1331. Plaintiff’s state-law claim for breach of contract must therefore be dismissed
25 for lack of subject-matter jurisdiction.

26 Because Plaintiff has failed to state a claim upon which relief can be granted, Plaintiff’s
27 complaint is **DISMISSED WITH LEAVE TO AMEND** pursuant to 28 U.S.C. § 1919(e)(2)(B)(ii).
28 *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127.

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1 **III. Plaintiff's Request for Appointment of Counsel Under 42 U.S.C. § 2000e-5(f)(1)**

2 Plaintiff requests that the Court appoint counsel under 42 U.S.C. § 2000e-5(f)(1). Because the
3 Court has dismissed this action, Plaintiff's request is **DENIED** as moot

4 The Court notes, however, that 42 U.S.C. § 2000e-5(f)(1) authorizes a district court to appoint
5 counsel "[u]pon application by the complainant and in such circumstances as the court may deem just."
6 *See also Johnson v. U.S. Dep't of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991) (noting that whether to
7 appoint counsel falls within the discretion of the district court). In deciding whether to appoint
8 counsel, the Court must consider: (1) the plaintiff's financial resources, (2) the plaintiff's efforts to
9 secure counsel, and (3) whether the plaintiff's claim lacks merit. *See Bradshaw v. Zoological Soc'y of*
10 *San Diego*, 662 F.2d 1301, 1318 (9th Cir. 1981).

11 Here, Plaintiff satisfies the first factor but fails to satisfy the second and third factors.
12 Regarding the first factor, the Court considered Plaintiff's financial circumstances in granting IFP
13 status. Regarding the third factor, as discussed above, Plaintiff failed to state a claim under Title VII.
14 Finally, regarding the second factor, Plaintiff discussed her case with just one attorney, who demanded
15 a \$5,000 deposit that Plaintiff was unable to pay. Plaintiff does not appear to have investigated the
16 possibility of retaining counsel on a contingency basis or from volunteer lawyer programs.

17 Regarding Plaintiff's other claims, the Constitution provides no right to appointment of counsel
18 in a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter*
19 *v. Dep't of Social Services*, 452 U.S. 18, 25 (1981). Under 28 U.S.C. § 1915(e)(1), however, district
20 courts have discretion to appoint counsel for indigent persons under "exceptional circumstances."
21 *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). A finding of exceptional circumstances requires
22 an evaluation of both the "likelihood of success on the merits and the ability of the petitioner to
23 articulate his claims *pro se* in light of the complexity of the legal issues involved. Neither of these
24 considerations is dispositive and instead must be viewed together." *Id.* (internal quotation marks and
25 citations omitted). As currently pleaded, Plaintiff's claims are not meritorious and they do they raise
26 particularly complex legal issues.

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CONCLUSION

For the reasons set forth above, the Court Orders as follows:


(1) Plaintiff's motion to proceed *in forma pauperis* is **GRANTED**. [Doc. No. 2.]

(2) Plaintiff's complaint is **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). If Plaintiff still wishes to continue to proceed with this matter she must, within thirty (30) days: (1) SUBMIT AN AMENDED COMPLAINT WHICH ADDRESSES ALL THE DEFICIENCIES OF PLEADING SET FORTH ABOVE; AND (2) ATTACH A COPY OF THIS ORDER. If Plaintiff's Amended Complaint still fails to state a claim upon which relief can be granted, it will be dismissed without further leave to amend. *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996) (holding that court may dismiss action pursuant to Fed. R. Civ. P. 41(b) if Plaintiff fails to comply with previous court order regarding amendment). [Doc. No. 1.]

(3) Plaintiff's request for appointment of counsel is **DENIED AS MOOT**. [Doc. No. 3.]

IT IS SO ORDERED.

DATED: 8/27/11


IRMA E. GONZALEZ, Chief Judge
United States District Court